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No. 99-6615

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1999

MICHAEL WAYNE WILLIAMS,

Petitioner,

v.

JOHN B. TAYLOR, WARDEN,
Sussex I State Prison,
Waverly, Virginia,

Respondent.

Supreme Court, U.S.
FILED
OFFICE OF THE CLERK

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR PETITIONER

Imminent Execution Date:
Thursday, October 28, 1999

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

REASONS FOR GRANTING THE WRIT 1

I. THIS COURT SHOULD DECIDE WHETHER A PROSECUTOR VIOLATES A TESTIFYING DEFENDANT'S SIXTH AMENDMENT RIGHT TO CONFRONT WITNESSES BY IMPEACHING HIM WITH HIS PRESENCE AT TRIAL AND, IF SO, WHETHER THIS CONSTITUTES A NEW RULE UNDER TEAGUE v. LANE, 489 U.S. 288 (1989) 1

II. THE FOURTH CIRCUIT'S INTERPRETATION OF 28 U.S.C. 2254(E)(2) PRESENTS AN ISSUE OF CRITICAL IMPORTANCE, CONFLICTS WITH THE DECISIONS OF OTHER CIRCUITS, AND IS CONTRARY TO THIS COURT'S PRECEDENTS 4

III. THE FOURTH CIRCUIT'S INTERPRETATION OF REVISED 21 U.S.C. SEC. 848(Q)(9), GOVERNING THE PROVISION OF EXPERT ASSISTANCE FOR INDIGENT DEFENDANTS, IS INCONSISTENT WITH THE TEXT AND INTENT OF THE STATUTE AND WITH McFARLAND v. SCOTT, 512 U.S. 849 (1994) 15

CONCLUSION 15

TABLE OF AUTHORITIES

CASES PAGE

Agard v. Portuondo, 117 F.3d 696 (2d Cir. 1997), aff'd on rehearing, 159 F.3d 98 (2d Cir. 1998), cert. granted, 119 S. Ct. 1248 (1999) . . . . . passim

Amadeo v. Zant, 486 U.S. 214 (1988) 7

Arizona v. Fulminante, 499 U.S. 279 (1991) 8

Brecht v. Abrahamson, 507 U.S. 619 (1993) 3

Brooks v. Tennessee, 406 U.S. 605 (1972) 1

Correll v. Stewart, 137 F.3d 1404 (9th Cir. 1998) 13

Dobbs v. Zant, 506 U.S. 357 (1993) 7

Green v. French, 143 F.3d 865 (4th Cir. 1998), cert. denied, 119 S. Ct. 844 (1999) 3

Griffin v. California, 380 U.S. 609 (1965) 1

Imbler v. Pachtman, 424 U.S. 409 (1976) 9

Keeney v. Tamayo-Reyes, 504 U.S. 1 (1992) 6

Kyles v. Whitley, 514 U.S. 419 (1995) 3

McCleskey v. Zant, 499 U.S. 467 (1991) 7

Mooney v. Holohan, 294 U.S. 103 (1935) 9

O'Dell v. Netherland, 117 S. Ct. 1969 (1997) 3

Patrick v. Johnson, 37 F. Supp.2d 815 (N.D. Tex. 1999) . . . 15

Sawyer v. Whitley, 505 U.S. 333 (1992) 6

Simmons v. South Carolina, 512 U.S. 154 (1994) 3

Stockton v. Commonwealth, 402 S.E.2d 196 (Va. 1991) 9

Strickler v. Greene, 119 S. Ct. 1936 (1999) 8, 11

Teague v. Lane, 489 U.S. 288 (1989) 1, 3

Thomas v. Goldsmith, 979 F.2d 746 (9th Cir. 1992) 9

Townsend v. Sain, 372 U.S. 293 (1963) 13

United States v. Kojayan, 8 F.3d 1315 (9th Cir. 1993) 7

STATUTES

21 U.S.C. sec. 848(q)(9) 1, 15

28 U.S.C. sec. 2254(d)(1) 3, 14

28 U.S.C. sec. 2254(e)(2) . . . . . passim

REPLY BRIEF FOR PETITIONER

As the petition demonstrated, this case raises three important issuing warranting review by this Court: (1) whether a prosecutor may impeach a testifying defendant based on his mere presence throughout the trial and, if so, whether this is a new rule under Teague v. Lane, 489 U.S. 288 (1989); (2) whether 28 U.S.C. 2254(e)(2), which prohibits a federal habeas court from holding an evidentiary hearing only "if the applicant has failed to develop the factual basis of claim in State Court proceedings," governs a petitioner's claims where the state suppressed the relevant facts, denied discovery, denied all resources to discover and develop claims, and denied an evidentiary hearing; and (iii) whether 21 U.S.C. sec. 848(q)(9) requires a petitioner, who moves to proceed ex parte for expert assistance, to demonstrate his need for confidentiality at an adversarial hearing. Respondent's brief in opposition offers no valid reason why this Court should deny review.

I.

At trial, the prosecutor urged the jury to infer from petitioner's exercise of his Sixth Amendment right to confront the witnesses against him that petitioner's testimony was fabricated and not credible. As petitioner explained (Pet. 15-22), the Virginia Supreme Court's decision upholding the prosecutor's conduct conflicts with the Second Circuit's decision in Agard v. Portuondo, 117 F.3d 696 (2d Cir. 1997), aff'd on rehearing, 159 F.3d 98 (2d Cir. 1998), cert. granted, 119 S. Ct. 1248 (1999). The decision below is flatly inconsistent with this Court's opinions in Griffin v. California, 380 U.S. 609 (1965), and Brooks v.

Tennessee, 406 U.S. 605 (1972). Furthermore, as this issue affects every case in which a criminal defendant considers testifying, it is of indisputable importance.

Respondent's brief is noteworthy for what it does not and cannot say. Respondent does not deny that this issue is important and recurring. Nor does he dispute that the state court decision conflicts with Agard, Griffin, and Brooks. Indeed, Respondent fails to make any serious attempt to defend the decision on its merits. While implicitly conceding error, he maintains petitioner must be denied relief on other grounds.

First, respondent attempts to distinguish petitioner's claim from that presented in Agard on the grounds that the improper comments in petitioner's case occurred during cross-examination while in Agard they occurred during summation. This is a distinction without a difference. The prosecutor's initial twelve questions during petitioner's cross examination were divorced from the substance of any prior testimony. They were directed solely at petitioner's presence throughout the trial and solely at petitioner's unique opportunity to hear all the prior testimony before testifying. Thus, petitioner was impeached with his right to confront the witnesses against him and to be present throughout his trial. Just as a prosecutor cannot argue to a jury that a defendant is not credible because he had the assistance of counsel, a prosecutor cannot cross examine a defendant with the fact that he had an attorney and did not proceed pro se. Impeachment with the mere exercise of a constitutional right diminishes that right,

makes its exercise costly, and is constitutionally prohibited. The state court's decision was simply wrong and is owed no deference under 28 U.S.C. sec. 2254(d)(1) or Green v. French, 143 F.3d 865 (4th Cir. 1998).

Second, respondent argues that although no "new rule" issue was raised by the petitioner in Agard either in its petition for certiorari or its merits brief (Opp. at 7-8), this Court's grant of certiorari somehow demonstrates that the issue presents a new rule under Teague v. Lane, 489 U.S. 288 (1989). Thus, respondent reasons, the Fourth Circuit correctly dismissed the claim as barred under the new rule doctrine.

As has been demonstrated repeatedly, a grant of certiorari review does not indicate this Court's ultimate decision on an issue. And a grant of certiorari does not demonstrate that this Court's decision will announce a new rule. See, e.g., Kyles v. Whitley, 514 U.S. 419 (1995). Moreover, this Court may elect to address the substantive constitutional issue first and the new rule issue second in separate decisions. See, e.g., Simmons v. South Carolina, 512 U.S. 154 (1994), and O'Dell v. Netherland, 117 S. Ct. 1969 (1997)(holding that rule announced in Simmons was new under Teague). Thus, petitioner's case presents this Court with an timely opportunity to address the Teague issue not raised in Agard. This is a compelling reason to grant certiorari review or, at a minimum, to issue a stay pending the decision in Agard.

Third, respondent argues that any impeachment error was harmless under Brecht v. Abrahamson, 507 U.S. 619 (1993).

Petitioner demonstrated in his brief that the Fourth Circuit's harmless error analysis was flawed as it focused only on petitioner's inculpatory testimony. (Pet. 21-23) This was error. The prosecutor's improper impeachment was harmful because it directly affected the jury's evaluation of petitioner's credibility. Contrary to respondent's shrill insistence that petitioner could not avoid a capital conviction given his testimony, the evidence demonstrated otherwise[1]. In light of this evidence, the court charged the jury on both capital murder and the lesser offense of first degree murder[2]. JA 287-288. As the prosecutor repeatedly emphasized on summation, the only issue for the jury to decide was the relative credibility of petitioner and Cruse. JA 295-96, 304, 317-19. If any one juror had a reasonable doubt, petitioner could not be convicted of capital murder. The prosecutor's improper cross examination was harmful as credibility was the only issue for the jury. The Fourth Circuit's analysis was flawed.

The issue is important, recurring and merits review.

II.

A. As respondent concedes, petitioner was represented by an "experienced" attorney in state habeas. (Opp. 5). The district

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[1] The medical examiner stated that one bullet entered and exited Mr. Keller's jaw. It was not necessarily a lethal wound. JA 198-199, 205. If this wound was inflicted first, Mr. Keller would have been able to move around (as he did when he stood up). JA 199.

[2] "If you find from the evidence that. . . Cruse alone killed [Mr. and Mrs.] Keller, then you shall find the defendant guilty of first degree murder [.]" JA 286-287.

court found that state habeas counsel made "numerous attempts to obtain the evidence required to discover, present, and prove [petitioner's] claims" but was denied "discovery, expert assistance, and investigative funds and . . . [a] hearing to take evidence outside of the trial record." A 16. When petitioner reached federal habeas, he discovered new claims using resources denied in state court. The district court initially granted petitioner an evidentiary hearing on three claims of juror and prosecutorial misconduct but was forced to revoke that order when the Fourth Circuit directed the court to apply 28 U.S.C. sec. 2254(e)(2) prohibiting an evidentiary hearing in most cases. The Fourth Circuit affirmed the denial of a hearing on appeal.

The correct interpretation and application of sec. 2254(e)(2) is of utmost importance to the federal courts. Respondent does not disagree and does not even discuss the statute. The Fourth Circuit's interpretation of 2254(e)(2) eliminates federal habeas hearings in the vast majority of cases where a petitioner can demonstrate cause and prejudice under this Court's prior precedents. The issue is critical in the Fourth Circuit, which includes the death penalty states of Virginia, North Carolina, South Carolina, and Maryland. It has heightened importance in Virginia. Since obtaining original jurisdiction of capital habeas petitions in 1995, the Virginia Supreme Court has <u>never</u> granted discovery, expert and investigative resources, or an evidentiary hearing to any capital habeas petitioner. The Commonwealth has systematically and routinely denied capital petitioners the means

to discover and develop constitutional claims while in state court. The Commonwealth now seeks to insulate its proceedings from federal review by the misapplication of sec. 2254(e)(2).

The Fourth Circuit's interpretation of 2254(e)(2) conflicts with that of its sister circuits because it ignores the conditions precedent for application of the statute ("if the applicant has failed to develop . . ."). All other circuits have held that the failure must be due to the petitioner's decision or omission before 2254(e)(2) applies. The Fourth Circuit applied 2254(e)(2) to all claims never raised in state court irrespective of the reasons. With this decision, the Fourth Circuit nullifies this Court's long standing and well developed doctrine of cause and prejudice to overcome procedural default in state court. In its place, the Fourth Circuit has substituted the miscarriage of justice standard set forth in Keeney v. Tamayo-Reyes, 504 U.S. 1 (1992), and Sawyer v. Whitley, 505 U.S. 333, 346-47 (1992) ("clear and convincing evidence" of actual innocence). As a result, if the state successfully conceals indisputable misconduct by the police, the prosecutor, and/or the jurors, until a petitioner enters federal proceedings, that petitioner must demonstrate his actual innocence before a federal evidentiary hearing can be held. This radical departure from established law merits this Court's review.

B. Respondent devotes most of his brief to arguing that petitioner cannot demonstrate cause and prejudice under pre-AEDPA law. Hence, this Court should deny review of the 2254(e)(2) issue. He is mistaken. When meeting the cause and prejudice standard,

petitioner also demonstrates that sec. 2254(e)(2) in inapplicable.

Petitioner raised two Sixth Amendment claims based on misconduct during voir dire. Petitioner demonstrated that the jury forewoman failed to reveal that she was the ex-wife of a prosecution witness, who happened to be the deputy sheriff, and failed to reveal that one of the prosecutors had been her divorce attorney[3]. Petitioner demonstrated that the prosecutor knew of this relationship and, in violation of his duty, failed to disclose it. See United States v. Kojayan, 8 F.3d 1315 (9th Cir. 1993).

In state habeas, petitioner moved for a jury investigator to investigate misconduct claims. JA 386. The Warden successfully opposed that motion as without merit ("frivolous") and argued that the "[state] Court certainly should not authorize the expenditure of taxpayer funds for an investigator to intrude upon the private lives of the jurors." JA 395. The district court found cause. JA 1300. See Dobbs v. Zant, 506 U.S. 357 (1993) (cause shown based on state's erroneous representations); McCleskey v. Zant, 499 U.S. 467, 497 (1991) ("external impediment, whether it be government interference or the reasonable unavailability of the factual basis

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[3] Respondent's argument that there was no "relationship" is refuted by the facts. The juror and the witness had four children and resided in the same small community. At the time of their divorce, the juror was granted custody and the witness visitation rights (and likely had support obligations as well). The children were then 7, 13, 15, and 16 years old. The juror and witness certainly had continued contact for several more years if only to deal with matters of education, medical care and health, holidays, vacations, travel plans, and the general welfare of their children. For these same reasons, the prosecutor's role in the divorce required resolution of complex issues dealing with custody, support, visitation, and property division. An evidentiary hearing would establish the facts and demonstrate an ongoing relationship.

for the claim is cause excusing procedural default); Amadeo v. Zant, 486 U.S. 214, 222 (1988) (cause present where evidence of violation was concealed by county officials and not reasonably available to petitioner's lawyers)(emphasis added).

The Fourth Circuit erred when it ignored this Court's established law on cause for procedural default and the most recent decision in Strickler v. Greene, 119 S. Ct. 1936 (1999)[4]. The juror claims were not "reasonably available," and there was state interference. Contrary to the Fourth Circuit's opinion, state habeas counsel was not required to review all public records on every juror and every juror's family members (or review the prosecutor's past and current client files) to satisfy some extraordinary diligence requirement where there was no hint that misconduct by both the juror and the prosecutor had occurred.

Petitioner was prejudiced by the seating of the juror, who became the jury forewoman[5]. The presence of a biased juror is not subject to harmless error analysis but constitutes a structural defect in the trial. See generally Arizona v. Fulminante, 499 U.S. 279, 307-10 (1991). The Fourth Circuit erred when it found no prejudice based on the content and length of the testimony by the

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[4] Contrary to Respondent's suggestion, the Fourth Circuit was well aware of the Strickler decision when deciding petitioner's case as one judge was a member of both panels. One may reasonably assume that the judges read this Court's decisions. In addition, petitioner argued in his petition for rehearing that the court had failed to follow Strickler.

[5] See cases cited in Petition For Writ of Certiorari at 30 and n. 14; in Petitioner's Brief On Appeal at 21-25; and in Petitioner's Reply Brief On Appeal at 7-8.

juror's ex-husband. The Fourth Circuit failed to cite any supporting authority and failed to discuss any of the numerous decisions mandating relief in similar cases. The decision has no support in the caselaw[6]. Petitioner was entitled to a hearing.

C. Petitioner raised a Brady claim based on the state's failure to disclose a psychiatric report in which Cruse admitted before trial that he had little recollection of the Keller murders. Respondent cannot dispute that the trial attorneys moved for production of all Brady material. JA 33. He cannot dispute that state habeas counsel filed an extensive Brady request and specifically asked for disclosure of all psychiatric reports that could affect a witness' credibility. JA 379. He cannot dispute that Respondent, represented by the very same counsel as in this proceeding, erroneously stated that there is no obligation in habeas proceedings to produce exculpatory evidence[7] and "we have no intention of doing so." JA 381. State habeas counsel then moved for discovery of "all documentation relating [to] the incarceration of Mr. Cruse from the date of his first incarceration . . . on capital murder charges[.]" JA 398. This was denied along

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[6] Respondent also errs when asserting the juror would not have been removed if she answered honestly. Dismissal for cause is entrusted to the discretion of the trial court. Stockton v. Commonwealth, 402 S.E.2d 196, 200 (Va. 1991). The trial court removed two jurors for less substantial reasons: one based on employment as a corrections officer seven years earlier and the second because he was a first cousin of the prosecutor.

[7] The Warden's position conflicts with: Mooney v. Holohan, 294 U.S. 103 (1935), Imbler v. Pachtman, 424 U.S. 409, 427 n. 25 (1976), Thomas v. Goldsmith, 979 F.2d 746, 749-50 (9th Cir. 1992).

with a motion to interview Cruse[8]. The state never produced the report. As respondent conceded, petitioner was represented by an "experienced" criminal defense attorney in state habeas. That attorney searched the available, known files on Cruse and did not find the report therein. He submitted an affidavit so stating to the district court. As an experienced defense attorney, he would have recognized the exculpatory nature of the report immediately. These facts soundly refute Respondent's suggestion that counsel saw the report but failed to appreciate its significance[9].

State habeas counsel's affidavit is unrefuted. Respondent obtained three lengthy affidavits from petitioner's trial attorneys in support of motions to dismiss in both state and federal court (JA 411-418, 476-488). However, Respondent has never obtained an affidavit from those attorneys verifying Respondent's suggestion (Opp. 17 n.14) that Cruse's psychiatric report was provided to them before trial, and they elected not to use it. Nor has Respondent submitted any affidavit from the two prosecutors stating that they provided the Cruse report to petitioner's trial attorneys as

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[8] The Commonwealth has also denied requests by state habeas counsel and federal habeas counsel to interview Cruse at any secure location selected by the Commonwealth. The Respondent's purported safety concerns are bogus. This case does not involve organized gangs where reprisals might be carried out by members at another institution. Counsel need not be told where Cruse is incarcerated permanently in order to conduct an interview. The Commonwealth's assertion (Opp. 15 at n.11) that Cruse declined to respond to a letter sent on Williams' behalf is unsupported by the record. All that is known is that the Commonwealth seized a letter sent to Cruse.

[9] Equally specious is Respondent's suggestion (Opp. 16 n. 12) that court documents are never misfiled, and the report was in the file all along.

required by Brady.

Petitioner has demonstrated cause to overcome procedural default and has shown why sec. 2254(e)(2) is inapplicable. The Fourth Circuit erred when it found counsel was not diligent. The state purported to fulfill its Brady obligations at the time of trial. The state then refused to provide any unproduced Brady material during state habeas and opposed all of petitioner's discovery and investigative efforts. As a result, the state suppressed the Cruse psychiatric report throughout state court proceedings. The Commonwealth has a notably undistinguished record for observance of Brady's requirements. See Strickler, supra (failure to provide witness' statements impeaching her trial testimony).

Petitioner has established prejudice as the district court found. JA 54. The only issue for the jury was the relative credibility of petitioner and Cruse. Had the jurors known that Cruse had little recollection of that evening, a first degree verdict would have been a reasonable probability. The trial court had instructed the jurors that they must convict petitioner of the lesser noncapital, offense of first degree murder if they had a reasonable doubt about the degree of the offense. JA 288. If Cruse had been impeached with the report, petitioner's testimony would have been unnecessary.

The denial of a federal evidentiary hearing was error.

D. Cruse testified against petitioner, later pled guilty to the capital murder of Mrs. Keller, and received a life sentence.

Petitioner alleged that Cruse had an undisclosed understanding about his sentence when he testified against petitioner. Petitioner raised this claim in state habeas but was denied discovery and a hearing. The federal district court granted a hearing. The Fourth Circuit erroneously directed the district court to apply sec. 2254(e)(2) to this claim. Protesting that this was error, the district court reluctantly cancelled the hearing and dismissed the claim. On appeal, the Fourth Circuit refused to admit its error or correct it. Instead the Fourth Circuit affirmed the dismissal of the Brady claim under sec. 2254(d)(1), a provision that applies only when a petitioner has had a full and fair opportunity in state court to present and develop a claim.

Respondent now tries to distance himself from both erroneous decisions of the Fourth Circuit by arguing that the Fourth Circuit acted under pre-AEDPA law. There is no merit to this argument.

Petitioner set forth sufficient facts for a hearing. In the Commonwealth's final argument to the jury, the lead prosecutor argued:

> [Cruse] sits here today facing the death penalty; he sits here facing capital murder, two counts of capital murder. And like he told you right now his back is against the wall; if he lies, he dies . . .

JA 319 (emphasis added). Respondent has never explained this remark. Respondent has never submitted an affidavit from the lead prosecutor, who made the argument, swearing under oath that there was no deal, no understanding, no arrangement with Cruse in exchange for his testimony against petitioner. Respondent has never submitted a sworn affidavit from Cruse. There is only one

logical inference from the prosecutor's argument: there was a direct relationship between Cruse's testimony and his sentence. That agreement may have been known only to the lead prosecutor and Cruse[10]. They have never submitted affidavits in any court.

Additional facts supported petitioner's claim that Cruse had an undisclosed agreement. The state never set a date for Cruse's capital trial. After his testimony, the charges against Cruse were reduced, and he was permitted to plead to one capital murder count. The state made a strong plea on Cruse's behalf for a life sentence based on his cooperation against petitioner. The Commonwealth has continued to hide Cruse throughout state and federal habeas proceedings. These facts support petitioner's Brady claim.

Respondent argues that petitioner failed to discover any facts to support his claim in state court. Of course, Respondent opposed all petitioner's discovery requests, motions for investigative assistance, motions to interview Cruse, and motion for an evidentiary hearing. In federal court, Respondent argued that 2254(e)(2) barred a hearing and all discovery. This was error as even the Fourth Circuit belatedly recognized. Having succeeded in blocking petitioner's discovery of the facts, Respondent cannot argue that petitioner is responsible for the undeveloped state (or federal) record. See Correll v. Stewart, 137 F. 3d 1404, 1414 (9th Cir. 1998). Under Townsend v. Sain, 372 U.S. 293, 313 (1963), a

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[10] Thus, affidavits from one prosecutor (the same prosecutor who failed to reveal the facts concerning juror Stinnett) and one defense attorney do not settle the issue. Moreover, that attorney, in a conversation with federal habeas counsel, indicated there was an understanding. JA 1405 at ¶5. He later denied this. JA 1402.

hearing is mandatory where the failure to develop the state record is attributable to the state. The Fourth Circuit erred under both pre-AEDPA law and the AEDPA.

Nor is the sentence agreement claim defaulted as Respondent suggests. The Commonwealth has denied throughout the trial, state habeas, and federal habeas proceedings that Cruse had a sentencing deal. Respondent continues to deny a deal existed. Hence, the undisputed facts pointing to a deal must have some other explanation -- an explanation Respondent has yet to offer. The default argument is fallacious.

Finally, petitioner demonstrated prejudice where credibility was the sole issue for the jury. The forensic evidence could not settle the issue. As set forth above in the discussion of the state's suppression of Cruse's psychiatric report, the jury was instructed on the lesser offense of first degree murder. Doubt about the degree of homicide had to be resolved in petitioner's favor. Had the jurors known that Cruse would gain a substantial benefit -- his life -- from his testimony, reasonable doubt and the reasonable probability of a different verdict would have resulted.

The Fourth Circuit applied sec. 2554(d)(1) to petitioner's claim ("an overall obligation of deference to the state court system . . . obtains . . . and must be upheld. . .")(A 6). This was error as was the its prior Order directing the district court to apply sec. 2254(e)(2).

The correct application and interpretation of sec. 2254(e)(2) merits review given its central importance to the new AEDPA.

III.

The correct interpretation and application of 21 U.S.C. sec. 848(q)(9) affects every capital defendant and habeas petitioner. The Fourth Circuit sua sponte has amended the statute to require an adversarial hearing on the need for confidentiality when a petitioner seeks to obtain services ex parte. Addressing the application of 848(q)(9), some district courts have required (i) a generic motion for services stating a need for confidentiality filed on the state along with (ii) an ex parte, sealed motion for specific services filed only with the court. See Patrick v. Johnson, 37 F. Supp.2d 815, 816 (N.D. Tex. 1999)(citing cases). Others have held that the state cannot be a party to these applications. See cases cited in Pet. at 39, n.17. No court, other than the Fourth Circuit, has held that a petitioner must demonstrate the necessity of confidentiality before opposing counsel. This is a radical position and contrary to the plain language of the statute itself. It merits this Court's review.

Petitioner has demonstrated that the state used its resources to impede the discovery and development of his constitutional claims in every forum, even going so far as to hide the principal witness. His fears of state interference were well-founded. Thus, petitioner insisted on an ex parte proceeding to demonstrate confidentiality and refused to waive that provision in the statute.

CONCLUSION

The petition for writ of certiorari and stay should be granted.

Respectfully submitted,
Barbara L. Hartung*
James E. Moore

*Counsel of Record

SUPPLEMENT TO PETITIONER'S APPENDIX

Q Can you describe the track that Gunshot Number Three took?

A That bullet went right to left and went through the facial bones.

Q If you could, using your own head, can you describe the entrance and exit of this particular gunshot wound?

A Well, the entrance is about here, the exit on the other side about here.

Q Did that pass through the brain?

A It did not.

Q What would you say about the lethal effect of that wound not entering the brain?

A Sometimes bullets can pass through the face and cause enough injury to the base of the skull and the brain to be fatal, so it's possible that it was. Since we had other wounds, you really cannot evaluate what individual damage that bullet would have done to the skull or the brain.

Q If it was the first wound inflicted and the only one inflicted, would you call it a potentially lethal wound in and of itself or not?

A Well, if it's the only wound inflicted, you would just have to judge that by the outcome.

Q Would it be fair to say that it contributed

to the death of Morris Keller in this case?

A Yes.

Q Again, was there an exit wound associated with Gunshot Wound Number Three?

A Yes, there was an exit wound.

Q If this was the first gunshot wound inflicted to the deceased, would it be possible for him to exercise, even after the infliction of this wound, some movement prior to the other wounds being inflicted?

A That might be possible.

Q I believe the next wound would be Gunshot Wound Number Four; is that correct?

A Yes.

Q Can you give the ladies and gentlemen of the Jury the location of that wound, please?

A There's a wound on the thigh, right thigh.

Q Was this a through and through entrance/ exit?

A Yes, it was.

Q Let me ask you this. In determining entrance and exit as to that gunshot wound, did you use the aid of the residue powders on the clothes?

A At the time the autopsy was performed, no.

Q Subsequently?

A Subsequently, we did have the knowledge of

you didn't say, was Shot Number Three a lethal wound?

A Yes, most certainly. All of those wounds could have caused death.

Q In and of themselves?

A In and of themselves, each individually.

Q Now, calling your attention to Mr. Keller's wounds --

A Okay.

Q -- and Mr. Von Schuch asked you with particularity to Shot Number Three, which passed through the face, basically?

A Yes.

Q And you indicated to him that that was a contributing factor to the death; is that right?

A It's contributing and on occasion in and of itself that type of wound can be lethal, but you cannot evaluate that because you have two other wounds that actually went into the head.

Q Okay. So my question to you, the first two, Shot Number One and Shot Number Two, were most definitely lethal wounds; is that correct?

A They are certainly potentially lethal, yes.

Q And Shot Number Three may have been lethal, but you cannot tell, in and of itself?

A That's correct.

shall find the defendant guilty and shall not fix the punishment until your verdict has been returned and further evidence is heard by you.

If you find from the evidence that Jeffrey Alan Cruse was the person who killed Mary Elizabeth Keller then you shall find the defendant guilty of first degree murder and fix his punishment at:

(1) Imprisonment for life; or

(2) A term of imprisonment of not less than twenty (20) years.

If you find the Commonwealth has failed to prove any one or more of the elements of the offense beyond a reasonable doubt, then you shall find the defendant not guilty.

The defendant is charged with the crime of capital murder. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) That the defendant killed Morris C. Keller, Jr.; and

(2) That the killing was willful, deliberate and premeditated; and

(3) That the killing of Morris C. Keller, Jr. occurred during the commission of robbery while the defendant was armed with a deadly

weapon;

AND/OR

(4) That the killing of Morris C Keller, Jr. occurred during the commission of, or subsequent to, the rape of Mary Elizabeth Keller;

AND/OR

(5) That the killing of Morris C. Keller, Jr. occurred as part of the same act or transaction in which the defendant also killed Mary Elizabeth Keller.

If you find from the evidence that the Commonwealth has proven beyond a reasonable doubt each of the above elements of the offense as charged, then you shall find the defendant guilty and shall not fix the punishment until your verdict has been returned and further evidence is heard by you.

If you find from the evidence that Jeffrey Alan Cruse alone killed Morris C. Keller, Jr. then you shall find the defendant guilty of first degree murder and fix his punishment at:

(1) Imprisonment for life; or

(2) A term of imprisonment of not less than twenty (20) years.

If you find the Commonwealth has failed to prove

any one or more of the elements of the offense beyond a reasonable doubt, then you shall find the defendant not guilty.

Willful, deliberate, and premeditated means the adoption of a specific intent to kill. The intent to kill must come into existence at some time before the killing, but need not exist for any particular length of time.

You have been instructed on more than one grade of homicide and if you have a reasonable doubt as to the grade of the offense, then you must resolve that doubt in favor of the defendant, and find him guilty of the lesser offense.

You may find the defendant guilty of capital murder if the evidence establishes that the defendant jointly participated in the fatal shooting, if it is established beyond a reasonable doubt that the defendant was an active and immediate participant in the act or acts that caused the victim's death.

All right, those are the instructions that you all will apply to the evidence that you have heard. Now these ladies and gentlemen will have an opportunity to argue their case before you.

MR. WOODSON: May it please the Court, Your Honor. Ladies and gentlemen of the Jury, I want to again

CERTIFICATION

I hereby certify that one copy of the attached Reply Brief For Petitioner was served on counsel for the Respondent, Donald R. Curry, Senior Assistant Attorney General, Office of the Attorney General, 900 E. Main Street, Richmond, VA 23219, on October 25, 1999, by fascimile and by first class mail.

Barbara L. Hartung

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